application for stay of execution was made to the Sessions Court by the surviving partner of the defendant firm. On January 15, 1982 the Sessions Court allowed stay on condition that the defendant deposit the judgment sum with the solicitors of the plaintiff firm within 30 days of the order. Soon afterwards an application was made in the Sessions Court by the same partner of the defendant firm to pay instead by monthly instalments of $500/= on the grounds that he was in financial difficulties. But this application was refused. Hence the present application.

The law on the granting of an order for stay of execution has been examined a number of times in the courts of this country. It is trite law that the court has an absolute and unfettered discretion to grant or refuse an application for stay. As a rule the court will however only grant stay if there are special circumstances and which circumstances must be deposed in the affidavit supporting the application. The governing principle in all cases where the court is asked to exercise its discretion is clearly expressed by Brown J. in *Serangoon Garden Estate Ltd.* v. *Ang Keng*(1) and the principle is this: the court will not deprive a successful party of the fruits of his litigation until an appeal is determined, unless the unsuccessful party can show special circumstances to justify it. The principle enunciated here goes back to many years ago as can be seen in *Monk* v. *Bartram.*(2) In that case stay had been refused by the trial judge and in the Court of Appeal it was held that where a stay of execution has been refused by the trial court an application made in a Court of Appeal for a stay pending appeal must be supported by special circumstances and allegations that there has been misdirection or that the verdict or judgment was against the weight of evidence, or that there was no evidence to support the verdict or judgment are not special circumstances. Lord Esher, M.R. in the Court of Appeal when refusing the application for stay said:

"We have made inquiries, and find that the practice in the Divisional Court has been similar to that as to appeals in this court in cases of trials before a judge without a jury. It has never been the practice in either case to stay execution after the judge at the trial has refused to grant it, unless special circumstances are shown to exist."

From the affidavit of the applicant here it seems clear that the sole ground relied on as special circumstances is to be found in paragraph 5 of the affidavit which reads as follows:

"I believe, it is imperative that a stay be granted as otherwise it will cause a permanent deprivation of money if the Plaintiff firm succeeds in the Appeal as there are merits in the Appeal in that there are points of law and facts for arguments."

Based on past precedents and authorities this ground cannot be regarded as special circumstances to justify an order for stay. In my opinion the application here was misconceived and I accordingly dismissed the Motion with costs.

Motion dismissed.

Solicitors: *Krishnan & Co.; Lovelace and Hastings.*

PROFESSOR DR. A. KAHAR BADOR & ORS. v. N. KRISHNAN & ORS.

[O.C.J. (Hashim Yeop A. Sani J.) May 10, 1982]

[Kuala Lumpur – Civil Suit No. A9 of 1982]

Practice and Procedure – Injunction – Interlocutory injunction – Application to set aside – Principles applicable.

In this case the applicants had obtained an *ex parte* injunction to restrain the defendants from acting in the capacity of elected members of the Committee of Management of a co-operative society and from taking control of the offices of the Society. The applicant had been elected to the Committee of Management of the society at its annual general meeting but thereafter a vote of no confidence against the Committee of Management had been passed and the defendants were elected from the floor to be temporary caretaker Committee of Management pending the outcome of an enquiry to be held by the Registrar of Co-operative Societies. The defendants applied to set aside the interlocutory injunction on the ground that there was allegedly suppression or misrepresentation of facts by the plaintiffs.

Held: (1) an interlocutory injunction will not be dissolved solely on the allegation of misrepresentation or suppresion of material facts unless the misrepresentation or suppression was of such a character as to mislead the court or where if the true picture was presented the court would probably not have granted the injunction;

(2) in this case the omissions by the first plaintiff to mention certain matters in his affidavit were not fatal to his application for interlocutory injunction, as the omissions did not amount to a suppression of material facts or omission intended to mislead the court nor was the court in fact misled.

Case referred to:

(1) *The Great Western Railway Co.* v. *The Birmingham & Oxford Junction Railway Co. & Ors.* 2 P.H. 597; 41 E.R. 1074.

CIVIL SUIT.

Atma Singh Veriah (*Hew Pang Fei* with him) for the applicants.

N. Marjoribanks for the defendants.

Cur. Adv. Vult.

Hashim Yeop A. Sani J.: On April 12 1982 an *ex parte* injunction was granted to restrain the defendants in the suit either by themselves or their agents or otherwise howsoever from acting in the capacity of elected members of the Committee of Management of the Mercantile Co-operative Thrift & Loan Society Limited Selangor (hereafter referred to as the "Society") and from taking control of the offices of the said Society at Bangunan Koperasi Mercantile, 54A Masjid India, Kuala Lumpur and from taking possession of any document, papers and files belonging to the said Society and from convening meetings of the said Society or in any way interfering or intermeddling in the business of the Society.

On April 22, 1982 the defendants applied to set aside the interlocutory injunction. Soon thereafter the defendants made another application to set aside the writ on the grounds of lack of jurisdiction and want of authority in suing the said Society.

On May 6, 1982 the application to set aside the interlocutory injunction was heard. The defendants sought to set aside the interlocutory injunction on broadly the following grounds –

(1) there is a dispute among the members of the Society or between certain members and the Committee of Management of the Society and in view of the provision of section 49 of the Co-operative Society Ordinance 1948 relating to any dispute "touching the business of a registered society" the issue of the writ and the application for the interlocutory injunction were premature as the remedies provided by the statute have not been exhausted;

(2) the writ and the application were taken out without the authority of the third plaintiff; and

(3) the *ex parte* injunction was obtained by suppression or omission of material facts and there was deliberate misrepresentation of material facts.

As the second application of the defendants to set aside the writ is also based on the first two grounds set out above, counsel accordingly submitted primarily on the third ground. The issue in the present application is therefore confined to the question whether there was suppression or omission of material facts and whether there was deliberate misrepresentation of material facts when the plaintiffs applied for the *ex parte* injunction.

The application for interlocutory injunction was supported by the affidavit of the first plaintiff, Prof. Kahar Bador, dated April 8, 1982. The affidavit sets out briefly the background of the dispute. The material date was April 4, 1982 being the date of the 48th Annual General Meeting of the Society. In accordance with By-law 88 of the Society's By-laws ballot papers had been sent to members of the Society together with notice of the general meeting. The election was supervised by the Senior Co-operative Development Officer. According to the affidavit all the plaintiffs were then duly elected as members of the Committee of Management for the year 1982.

The affidavit concluded with the statement that the election of the defendants were however not in accordance with the by-laws of the Society and was therefore null and void and as such they have no right to meddle in the affairs of the Society. Because the assets of the Society exceeds $19 million as shown in the balance sheet of the Society as at December 31, 1980, the plaintiffs urged that the injunction be issued to restrain the defendants from causing incalculable loss to the Society.

In the affidavit of one Ho Tiap Guan dated April 9 1982 he stated that he was a member of the Society and was appointed as Assistant Chief Supervisor in the election of the Committee Members at the Annual General Meeting concerned. He stated that none of the persons elected from the floor, namely the defendants, were elected by ballot papers. He attached to his affidavit a photostat copy of the results of voting by ballot as shown in the exhibit which indicates that the first plaintiff obtained 2,666 votes, the second plaintiff obtained 2,088 votes and the third plaintiff 1,931 votes. It does not seem to be disputed that the Society has a total number of members of more than 17,000 but only about 460 were present at the said Annual General Meeting.

The law in granting or refusing interlocutory injunction is clear and so is the law on the exer-

cise of the court's direction to dissolve an interlocutory injunction. The law on the granting of interlocutory injunction is neatly expressed by the Lord Chancellor in *The Great Western Railway Co.* v. *The Birmingham & Oxford Junction Railway Co. & Ors.*[1] where he said:

"It is certain that the court will in many cases interfere and preserve property in status quo during the pendency of a suit, in which the rights to it are to be decided, and that without expressing, and often without having the means of forming, any opinion as to such rights ... It is true that the court will not so interfere, if it thinks that there is no real question between the parties ; ... in order to support an injunction for such purpose, it is not necessary for the court to decide upon the merits in favour of the Plaintiff."

The law on dissolving an interlocutory injunction is also clear especially where the application to dissolve an interlocutory injunction is based solely on the allegation of misrepresentation or suppression of material facts.

An interlocutory injunction will not be dissolved unless the misrepresentation or suppression was of such a character as to mislead the court or if the true picture was presented the court would probably have not granted the injunction.

What are the alleged suppression or misrepresentations in this case? It is alleged by the defendants that the affidavit of the first plaintiff omitted to mention a number of matters and events which took place at the Annual General Meeting. These matters and events are as follows –

(1) Notice was given by the first defendant before the Annual General Meeting that he would raise questions relating to alleged misappropriation of the Society's funds by the Committee;

(2) After the results of the election of the plaintiffs were announced there was dissatisfaction among the members present and subsequently at the same meeting a vote of no-confidence was passed against the Committee of Management;

(3) That there was a resolution passed at the meeting carried almost unanimously that the management of the Society be handed over to the Ministry of Rural Development pending the outcome of investigations on the misappropriation.

The defendants in effect also complained that paragraph 8 of the affidavit of the first plaintiff tended to mislead the court by referring to the defendants seizing control of the meeting which they claimed never happened.

An interlocutory injunction is merely provisional in its nature, and does not conclude a right. It is said that a person who comes to the court for an interlocutory injunction is not required to make out a case which will entitle him at all events to relief at the hearing. It is enough if he can show that he has a fair question to raise as to the existence of the right which he alleges. It can be seen that in an application for an interlocutory injunction the court interferes on the *assumption* that the party who seeks its interference has the legal right which he asserts. A man who seeks the aid of the court must be able to show a *fair prima facie case* in support of the title which he asserts. He is not required to make out a clear legal title. It is sufficient that he satisfies the court that he has a fair question to raise as to the existence of the legal right which he sets up, and that there are substantial grounds for doubting the existence of the alleged legal right, the exercise of which he seeks to prevent. It has also been accepted that the mere existence of a doubt as to the plaintiff's right to the property, interference with which he seeks to restrain, does not of itself constitute a sufficient ground for refusing an injunction.

In the instant case there are many allegations against the rights of the plaintiffs to hold office in the Society. First, it is said that the first plaintiff, Prof. Kahar Bador, was in fact *disqualified* from being a candidate by virtue of certain by-laws of the Society. Secondly, there are charges of *malpractice* and misappropriation against him and others. Thirdly, there is also the allegation that the by-law of the Society was *violated* by not indicating clearly on the ballot papers candidates who had served in office more than four years continuously. Finally, there were other *irregularities* in the elections of the plaintiffs.

All these allegations are however denied by the plaintiffs. These questions therefore become serious issues to be tried. In my opinion the counter-allegations by the plaintiffs are equally serious. For example the allegation in the affidavit of the first plaintiff dated May 5 1982 which seem to cast doubt on the legality of the supposed care-taker committee of management itself, namely the defendants, since it is alleged that the by-laws of the Society do not provide for the election of such a body. Since the defendants were not elected in accordance with any provision of the by-laws of

the Society they have therefore no powers to interfere in the management of the Society. Then there is the allegation that the chairman of the meeting which elected the caretaker committee, Raja Nasron bin Raja Ishak, was not even a member of the Society at the material time.

It can be noticed however that despite the many allegations and counter-allegations in the affidavits there has not been one allegation that the Annual General Meeting convened on April 4, 1982, that is the 48th Annual General Meeting of the Society, was unconstitutional or otherwise invalid. Since the plaintiffs were elected in accordance with the procedure provided by the by-laws of the Society it cannot be disputed in my view at least at this stage, that *prima facie* they were validly elected to office. Until it be shown at the hearing that there were irregularities or other violations which render the election null and void, it must be presumed that the plaintiffs are for the moment holding office validly. A vote of no-confidence passed against them soon after the results of the election was announced did not make their election any less valid.

In the context of the facts now available before the court it is my opinion therefore that the omissions by the first plaintiff to mention certain matters in his affidavit are not fatal to his application for interlocutory injunction. The omissions did not amount to a suppression of material facts or omission intended to mislead the court nor was the court in fact misled.

For the above reasons the motion was dismissed and the interlocutory injunction ordered to continue until trial of the suit. Sr. Asst. Registrar to fix early date of hearing of the second application.

Order accordingly.

Solicitors: *Huang & Hew, Lovelace & Hastings.*

YAP SEE TECK v. PUBLIC PROSECUTOR

[A.C.J. (Mohamed Azmi J.) June 19, 1982]
[Kuala Lumpur – Federal Territory Criminal Appeal No. 125 of 1980]

Criminal Law & Procedure – Three persons jointly charged with offence – One of them pleading guilty – Procedure to be followed.

In this case three persons were jointly charged for two offences of gang robbery under section 395 of the Penal Code. At the commencement of the joint trial, one of the accused pleaded guilty to both charges and he was convicted and sentenced to three years' imprisonment on each charge to run concurrently. The other two accused were tried and at the trial the accused who had pleaded guilty and been sentenced was called to give evidence for the prosecution. The two accused were found guilty and sentenced to five years' imprisonment on each charge, the sentences to run concurrently. One of them, the appellant, appealed.

Held: (1) where a co-accused pleads guilty before the commencement of trial, it is desirable for the court to enquire whether the prosecution or the remaining co-accused wish to call him as a witness. If either the prosecution or the defence initimated that they wished to do so, it is desirable in the interest of justice that the court should not postpone sentence, but should proceed to dispose of the case, before removing him from the court. But if neither party requires him as a witness, sentence should be postponed until after the trial against the remaining accused has been completed;

(2) in this case as the accused, who had pleaded guilty, was required by the prosecution as a witness, the learned trial President did not err in law in taking the course he did when the first accused pleaded guilty;

(3) the fact that the learned President had recorded the brief facts of the prosecution case would not be prejudicial to the appellant, because as correctly stated by the learned President, even if the appellant and the other accued had been tried before another President, it would still be open to the prosecution to elicit from him the facts of the prosecution case including the fact that he had pleaded guilty to the charges. In the circumstances the refusal of the learned President to allow the application for appellant's case to be heard before another President was not wrong in law.

Cases referred to:

(1) *Toh Ah Loh and Mak Thim* v. *R.* [1949] M.L.J. 54.
(2) *Seet Ah Ann* v. *Public Prosecutor* [1950] M.L.J. 293.
(3) *Lee Weng Sang* v. *Public Prosecutor* [1976] 1 M.L.J. 82.

CRIMINAL APPEAL.

Karpal Singh (*Gnani Joseph* with him) for the appellant.

Gooi Soon Seng (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.